No. 5[illegible]

IN THE

Supreme Court

OF THE

UNITED STATES

BERTHA A. OWENS, Executrix of the Estate of Leyle F. Owens, Deceased,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

ANSWER BRIEF OF RESPONDENT UNION PACIFIC RAILROAD COMPANY

Upon Certiorari to Review the Decision of the United States Circuit Court of Appeals for the Ninth Circuit

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STATEMENT OF THE CASE

This action was brought under the Federal Employers' Liability Act by Bertha A. Owens as executrix of the estate of Leyle F. Owens, her deceased husband. In her first cause of action plaintiff sought recovery for the personal injuries, pain and suffering sustained by her husband prior to his death and in

her second cause of action for her loss of support and maintenance resulting from his death. (R., pp. 1-8.)

Both causes of action set out five separate grounds of alleged negligence on the part of respondent railroad or its employees which were alleged to have proximately caused the death of plaintiff's decedent. At the close of all the evidence the trial judge found that four of the alleged grounds of negligence and the proof submitted by plaintiff in connection therewith were legally insufficient to submit to the jury. The case was submitted however on the one remaining ground of negligence: namely, the alleged violation of Company rule 30 relating to ringing the engine bell. (R., p. 215.)

The allegations of plaintiff's amended complaint relative to the one ground of negligence permitted by the court to go to the jury were to the effect that "during all of the times herein mentioned defendant had in force * * * a further rule providing '*30. Engine bell must be rung when an engine is about to move and when approaching and passing public crossings at grade, stations, tunnels and snowsheds.*' * * * that the aforesaid injuries to plaintiff's decedent causing his death were due proximately to the negligence of the defendant in the following respects: * * * (d) -that defendant and defendant's enginemen carelessly and negligently failed and neglected to ring the bell of the engine, as provided by the aforesaid rule, before moving said engine and cars or when same were about to move; * * *" (R., pp. 3, 5, 7.)

The answer of defendant to said allegations admitted that said rule was in force but alleged "that said rules, and each of them, had no application in any way to the switching movement which was being made at the time of the alleged accident. * * *" The answer denied that defendant or its enginemen were negligent in failing or neglecting to ring the bell. (R., pp. 10, 12, 14), and affirmatively alleged that decedent had assumed the risk, and that his own negligence was the proximate cause of his death. (R., 16 and 17.)

Plaintiff's decedent died from injuries received when he was run over by two freight cars which were being moved in the course of switching operations in respondent railroad's switchyard in Spokane, Washington. Both of decedent's legs were crushed necessitating amputation and resulting in death within 2½ hours after the accident. At the time of the accident which occurred during daylight hours around 3:15 P.M., on February 16, 1939, decedent was employed by respondent railroad as Engine Foreman and was in charge of the switching operation which occasioned his injuries and death. (R., pp. 53, 195.) Working with decedent and subject to his orders were two other switchmen, Koefod and Hinkle, and the engine crew composed of engineer Richards and fireman Seal. (R., p. 195.)

This crew under the direction of decedent was making up a train of freight cars in the old Spokane

switchyard for transfer to various other roads. (R., p. 260.) Operations were conducted over a series of tracks numbered from 1 to 13 and several other tracks designated locally by names such as the "Old Main Line," the "Pendleton," etc. These tracks were all joined by inter-connecting leads and switches. Generally the tracks ran in an easterly and westerly direction crossing Washington Street near the west yard limits and Division Street on the east, both at grade. (Pl. Ex. A.)

On the operation in question the engine had headed west on the old main line and had coupled onto 2 box cars near Washington Street. The engine then backed up easterly pulling the 2 cars. During this movement decedent Owens was riding on the stirrup, holding the grab irons on the north side at the west end of the car coupled to the engine, and his switchman Koefod was riding about 3 or 4 feet away from him on the north side of the next car. (R., p. 56.) While riding in this position Owens verbally instructed Koefod to "let these cars go 13." (R., pp. 71, 75.) As the cars passed over lead switch No. 7 which served tracks 7, 8, 9, 10, 11, 12 and 13, Owens dropped off and gave the engineer the stop sign. (R., p. 58.) The cars stopped past the switch a distance variously estimated at 7 to 30 feet. (R., pp. 34, 58, 124, 134.) Owens then walked around the west end of the rear car and crossed the track to No. 7 switch stand which was on the south side of the track. Koefod took up a position some 20 feet north of the cars where he could plainly see the

switch points (R., p. 76), although the view of Owens and the switch stand on the south side of the track were obstructed by the cars. (R., p. 59.)

The switch was thrown and as soon as Koefod saw the switch points change into line with No. 13 lead, pursuant to the instructions received from Owens, he signalled the engineer (who was also on the north side) to kick the cars in toward No. 13 track. This same identical movement had been handled by the same crew in this same way many times. (R., pp. 77, 78, 80, 146.)

The engineer in response to the signal gave the cars a kick or quick push and Switchman Koefod pulled the pin uncoupling the cars from the engine permitting the cars to roll on down toward track 13, while the engine stopped and started back toward Division Street to get another car. (R., pp. 66-67.)

No bell was rung during or preceding the kick movement.

Koefod after pulling the pin had stepped on the foot board of the engine and almost immediately his attention was called to a man near Division Street who was pointing back down the track. Koefod looked back and saw Owens lying on the ground on the south side of the track near the switch which he had thrown and over which the cars had just been kicked. (R., p. 68.) On running back to Owens, it was found that his legs had been run over.

There was no testimony or evidence whatsoever as to why Owens got on the track in front of the cars which were kicked. It had been the practice without exception for the man handling the switch on this type of an operation to stay at the switch until the movement had been completed. (R., pp. 44, 86, 194.) No explanation or reason was advanced in any testimony as to why Owens departed from the established practice. The testimony as to the instructions given Koefod by Owens was clear and there was no evidence of any misunderstanding. In fact, the trial court in eliminating one of the other claims of negligence stated: "I don't think under the testimony there was any necessity for further hand signals. ***The decedent, Owens, had orally instructed the field switchman to kick back those two cars and had the right to apprehend they would be kicked back.***" (R., p. 169.)

The only witness to the accident was the engineer on another switch engine down the line who looked up and saw Owens in the middle of the track just before he was struck. (R., pp. 36 and 47.) At that moment Owens was looking north and then down the track away from the approaching cars. (R., p. 36.) Had he looked toward them there was nothing to prevent his seeing the cars. (R., p. 48.) Neither was there anything to prevent his hearing the cars. Switchman Hinkle heard the cars moving from 75 feet away. (R., p. 114.)

As already stated it was not contended by respon-

dent railroad that the engine bell was rung during or preceding the kick movement. On the contrary, evidence was offered that it was the custom and practice never to ring the bell in ordinary switchyard movements and that Rule 30 relative to bell ringing was universally understood, interpreted and treated by officers and employees alike as having no application to ordinary switchyard movements. (R., p. 185.)

So far as the issue of assumption of risk was concerned the testimony was uniform that the bell was never rung in ordinary switch movement within the yard unless a street was being crossed, or unless section hands or someone other than the train crew were discovered on the track. (R., pp. 81, 184, 187, 195, 204, 207, 208, 210.) No testimony to the contrary was offered.

The testimony was also uniform that this practice had been the custom for over 20 years—during all of the time Owens had worked there, that Owens was familiar with the practice, and followed it himself, and permitted his crew to follow it. (R., pp. 195, 197, 210.) It appeared that on the day of the accident some 200 switching movements had already been made by Owens' crew, in none of which the bell was rung except when the operation crossed one of the city streets. (R., p. 80.) Nothing was offered by plaintiff to controvert this testimony. One of the points on which respondent relied was that plaintiff's decedent assumed the risk that switching operations would be conducted without the bell being rung.

At the close of plaintiff's evidence, defendant presented a motion for non-suit and dismissal, which was denied by the court. The trial court's ruling is set out at pages 168-174 of the record. At the close of all the evidence a motion for directed verdict was denied. (R., p. 211.)

The trial judge then gave his instructions to the jury, including a peremptory instruction that Rule 30 applied to switchyard operations and that its violation constituted negligence as a matter of law and that if such negligence was a proximate cause of the death of decedent, plaintiff would be entitled to recover, (R., pp. 216-217) unless decedent assumed the risk. (R., p. 223.) This instruction was excepted to by respondent, and was assigned as one of the errors on the appeal to the Circuit Court of Appeals.

The jury returned a verdict for plaintiff for $2,000.00 on the first cause of action and $8,000.00 on the second cause of action. (R., p. 247.) Motions by defendant to set aside the verdict and enter judgment for defendant, and in the alternative for a new trial were denied. (R., pp. 252, 253.)

Upon appeal to the Circuit Court of Appeals for the Ninth Circuit the judgment of the trial court was reversed. (R., p. 268; 129 Fed. (2) 1013.)

The present brief is intended to supplement the brief heretofore filed by respondent in opposition to the petition for a writ of certiorari.

ARGUMENT

I.

The Circuit Court of Appeals correctly held that, as a matter of law, decedent assumed the risk.

Mr. Owens, plaintiff's own testimony showed, had been continuously employed by the Union Pacific Railroad Company since April, 1917, a period of almost 22 years, up to the time of his death. During that time his work had always been as a switchman, or engine foreman in the Spokane yards. During the last few years his work had been almost entirely that of engine foreman having direct personal charge and supervision of his switching crew. (R., pp. 159-160.)

The testimony was uniform and uncontradicted both from plaintiff's and defendants' witnesses, that it was the universal custom and practice not to ring the bell in ordinary switching operations, in which custom and practice decedent joined. Plaintiff's witness Koefod testified to this effect (R., p. 81):

> "Switching up there on the lead when we don't use the crossing or cross a street, we don't use the bell or the whistle."

The testimony of defendants' witnesses was uniform and conclusive, and to the same effect as that given by plaintiff's witness Koefod, namely, that it was the universal custom and practice never to use the bell in ordinary switchyard movements except when crossing the street or when necessary to warn section men or

some one actually seen or known to be on the track. The testimony of these witnesses will be found in the record as follows:

P. T. McCarthy (Division Superintendent), pages 184, 185, 187, 188;

D. B. Pidcock (Yardmaster), pages 195-196;

A. Rutherglen (Northwest Safety Agent), page 204;

C. N. Richards (Engineer), pages 206, 207 and 208;

F. H. Lang (Engine Foreman), page 210.

The cases hold that an employee has assumed the risk as a matter of law in circumstances similar to those involved here. Two decisions of the Supreme Court will suffice:

Toledo St. L. & W. R. Co. v. Allen, 275 U. S. 165; 72 L. Ed. 513;

Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218; 70 L. Ed. 914.

In the *Toledo* case, the court held that a car checker employed in the railroad company's switchyard, assumed the risk as a matter of law where there was no showing that he was without knowledge or unfamiliar with the switching practices followed in that yard:

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence

of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz v. Humphreys,* supra.

"In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

In *Chesapeake & O. R. Co. v. Nixon,* the court, speaking through Mr. Justice Holmes, held that a section man assumes the risk of injury through neglect of train operators to maintain a lookout while the train is in motion:

"The deceased was an experienced section foreman upon the defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used a three-wheeled velocipede that fitted the rails and was propelled by the feet of the user. He had obtained from his immediate superior, the supervisor of track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at seven in the morning and at half past six on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed.

* * * * * * * * *

"If the accident had happened an hour later when the deceased was inspecting the track, we

> think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection from its employees. (Citations omitted.) The duty of the railroad company toward this class of employees was not affected by that which it might owe to others.
>
> "The permission to use the velocipede in going to his work did not make the defendant's obligation to the deceased greater than it would have been after he got there."

It is worth recalling again that on the day of the accident, the decedent and his crew had already engaged in some 200 switching movements, in none of which had the bell been rung, except when the operations crossed one of the city streets. (R., p. 80.) It is also to be remembered that decedent himself had given the switching instruction and knew that the cars would be kicked immediately. (R., pp. 169 and 74-75.) On this state of facts and in view of the custom and practice, the Circuit Court of Appeals correctly found that, "The existence of Company Rule 30, which plaintiff urges should be construed so as to require the ringing of the engine bell even in switching movements, is immaterial on the question of whether or not the decedent assumed the risk where as here the evidence is uncontradicted that the rule had not been so construed by employees including the decedent for more than twenty years prior to the accident." (R., p. 274.)

II.

The decision of the Circuit Court of Appeals is supported by other grounds than that stated in the Opinion.

A. ***There was no proof of negligence on the part of respondent railroad or its employees.***

Although the plaintiff alleged five separate grounds of negligence in her complaint, it has already been noted that the trial judge found the proof to be insufficient as to four of said grounds and eliminated them from the consideration of the jury. The case was submitted to the jury on the single alleged ground of negligence that respondent railroad failed to ring the engine bell pursuant to the provisions of Rule 30, which specifies that "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings, at grade, stations, tunnels and snowsheds."

It is respondent's position that the non-ringing of the bell before or during the switching movement in which decedent was injured furnishes no ground on which negligence can be based, and that the trial court should have so held as a matter of law. This question we submit, has been determined by the decisions of the Supreme Court in the case of *Aerkfetz v. Humphreys*, 145 U. S. 418; 36 L. Ed. 758, and *Toledo St. L. & W. R. Co. v. Allen*, 275 U. S. 165; 72 L. Ed. 513. These two cases establish the rule that at common law

in ordinary switchyard operations, the giving of signals by ringing a bell or blowing a whistle is unnecessary so far as switchyard employees are concerned.

As stated in the *Aerkfetz* case, (page 420):

> "The ringing of bells or sounding of whistles of trains going and coming and switch engines moving forward and backward would have simply tended to confusion."

In the *Toledo* case, an employee working as a car checker was injured by a shunted car in the railroad company's switchyard. He brought action under the Employers' Liability Act, alleging among other things that the defendant was negligent in failing to cause the engine bell to be rung. The Supreme Court reversed the judgment in the employee's favor, holding that the failure to ring the engine bell in switchyard operations did not constitute negligence under the Employes' Liability Act. The decision in the *Toledo* case has never been modified or reversed, and we submit that it is conclusive on the issue here presented.

This is in fact a case where the act of decedent in stepping on to the track in front of the cars was itself the cause of his own death.

> *Willis v. Pennsylvania R. Co.*, 122 Fed. (2) 248 cert. denied 314 U. S. 684; 86 L. Ed. 547.

B. ***The common law rule as established by the Supreme Court decisions above referred to, is not affected in the present case by the existence of Company Rule 30.***

It is well established that unless the employee is one for whose protection the rule is intended, breach of the rule gives rise to no cause of action.

> *Thomson v. Downey,* 78 Fed. (2) 487; (C. C. A. 7th, 1935);
>
> *Central Vermont Ry., Inc. v. Sullivan,* 86 Fed. (2) 171; (C. C. A. 1st, 1936);

See also:

> *C. & O. Ry. Co. v. Mihas,* 280 U. S. 102; 74 L. Ed. 207.

In the case first cited above, *Thomson v. Downey,* the company rule required the foreman to keep a lookout for signals and obstructions along or on the track. The court held that this rule did not apply for the benefit of the section foreman who was operating a track velocipede at the time he was struck by defendant's train. We quote briefly from the opinion:

> "In the absence of proof that decedent was exposed to some unusual danger, it cannot be held that the engineer and fireman were in duty bound to give him warning. They had a right to believe that he would keep out of the way of the train.
>
> *Toledo, St. Louis & Western Railroad Co. v. Allen,* supra.
>
> "Appellee contends, however, that under appellant's Rule 1218 it was the duty of the fireman to assist the engineer in keeping a lookout for signals and obstructions. It is not sufficient for one to show that he has been injured by the failure of another to perform a duty or obligation unless that duty or obligation was one owing to him.

Chesapeake & Ohio Railway Co. v. Mihas, supra;

Chesapeake & Ohio Railway Co. v. Nixon, supra." * * *

"We are convinced that Rule 1218 was not promulgated for the safety or protection of decedent, and it should not have been admitted in evidence.

"Under these circumstances we are of the opinion that the court erred in not instructing the jury to return its verdict in favor of appellant."

In the *Central Vermont Railway Co.* case a company rule provided that no train could follow a preceding train while the latter was still between the stations. And another rule required a whistle warning to be given to persons on the railroad's track, bridges or trestles. The Circuit Court of Appeals for the First Circuit held that a section foreman who was injured when he was run into on one of the company trestles could not claim the benefit of the rules, and the judgment for the plaintiff was vacated and order entered for the defendant. In its opinion the court uses the following language:

"This is equivalent to claiming that the defendant, in issuing the rules, although indisputably for the protection of its trains, assured its trackmen that obedience thereto could be depended upon by them and thus a duty was imposed upon it, in respect to such trackmen, to see they were obeyed, a position contrary to the well-settled decisions of the federal courts, which hold that a railroad owes no duty toward its trackmen to look out for them and the burden of their protection

from the danger of being hit by passing trains rests upon themselves. *Chesapeake & Ohio Ry. Co. v. Nixon,* 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914; *Toledo, Etc., R. R. Co. v. Allen,* 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513; *Norfolk & W. Ry. Co. v. Gesswine,* (C. C. A.) 144 F. 56; *Thomson v. Downey,* (C. C. A.) 78 F. (2d) 487; *Biernacki v. Pennsylvania R. Co.,* (C. C. A.) 45 F. (2d) 677."

* * *

"It may, however, be claimed that Sullivan was entitled to the benefit of Rule 59 requiring ample warning by whistle to a person on the track, bridge or trestle. This rule has to do with a person seen or known to be on the track in a position of danger. Sullivan, a section man, was not entitled to the benefit of the rule unless he was seasonably seen or known to be on the track or bridge in such position."

We repeat, therefore, that the existence of Rule 30 does not affect the common law rule that no negligence can be predicated on failure to ring an engine bell in switchyard operations—for the reason that Rule 30 cannot be construed as intended for the protection or benefit of an engine foreman under whose personal supervision and instructions the engine was being moved.

Plaintiff's decedent was the engine foreman in charge of the switching crew. (R., pp. 193-195.) As engine foreman he determined what switching moves were to be made, and he had complete control over his two assistants and over the engineer and fireman comprising the engine crew. We are unable to see any escape from the proposition that Rule 30 was not in-

tended for the benefit or protection of any of the members of the switching crew engaged in handling the actual switching movement of the engine and cars.

Obviously, the rule could not be for the benefit or protection of the engineer or fireman seated in the engine cab, who would be the ones to handle the engine brake and throttle to set the engine in motion.

Obviously, the rule could not be for the benefit or protection of the switchman who gave the hand signal to the engineer to move the train.

By the same token and *a fortiori*, the rule cannot be applied to the switching foreman, namely, plaintiff's decedent, who gave the specific instructions to have the engine make this move, and who threw the switch so that the move could be made.

The trial court applied this same reasoning in eliminating one of the other grounds of negligence, when it said (R., p. 169):

> "I don't think under the testimony there was any necessity for further hand signals. *The decedent, Owens, had orally instructed the field switchman to kick back those two cars, and had the right to apprehend they would be kicked back.* There was no necessity, in view of the fact hand signals were to be given on that side of the engine where the engineer was located."

It seems to us this same line of reasoning applies with equal strength to the non-ringing of the bell.

In other words, so far as plaintiff's decedent, and the other members of the switching crew were concerned, they were in active charge of the movements of the switching engine. The engine was moved under their instructions and pursuant to their signals. The rule specifying the ringing of the bell could not have been intended to protect them against something which they themselves were doing. The rule was intended for the protection of the public and for the protection of employees other than members of the switching crew—other employees who might not be apprised of the movements or approach of the switch engine.

As stated in the *Toledo* case, so far as plaintiff's decedent was concerned:

> "On the evidence it must be held that he knew how switching was done there, and in the absence of proof that he was exposed to some unusual danger by reason of the departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car."

Without an exception every case cited by petitioner is distinguishable in this regard on the vital point that the injured employee was not in charge of nor taking part in the switching operation. Furthermore in none of the cases presented by petitioner was there undisputed evidence of custom over a long period of years establishing the non-applicability of the rule to ordinary switchyard operations.

CONCLUSION

In conclusion, respondent refers once again to the matters set out in its brief opposing the petition for writ of certiorari as supporting a denial thereof. On the merits, respondent respectfully submits that the judgment of the Circuit Court of Appeals should be affirmed on either the ground that decedent assumed the risk as a matter of law, or on the ground that there was no legally sufficient proof of negligence on the part of respondent or its employees.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 580.—October Term, 1942.

Bertha A. Owens, Executrix of the Estate of Leyle F. Owens, Deceased, Petitioner, *vs.* Union Pacific Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 14, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner is the widow of an employee of respondent. In 1941 she brought this suit under the Federal Employers' Liability Act, 45 U. S. C. §§ 51-59. Her husband's death occurred in the course of his employment as foreman of a switching crew on February 16, 1939. She claims this was due to respondent's negligence. Petitioner sought to recover in one cause of action for Owens' suffering before death and in another for his death. The trial judge withdrew from the jury, for insufficiency of proof, four of the five separate grounds of negligence alleged. The case was submitted on the remaining ground, an alleged violation of Company Rule 30, and the defenses of assumption of risk and contributory negligence. Rule 30 provided:

"Engine bell must be rung when an engine is about to move and when approaching or passing public crossings at grade, stations, tunnels and snowsheds."

The jury found for petitioner and a judgment was entered on the verdict. The Court of Appeals reversed without considering the questions of negligence and contributory negligence. It held that as a matter of law Owens assumed the risk of death in the activities in which he was engaged when the accident occurred. 129 F. 2d 1013. We think this ruling was erroneous.

At the time of the accident and for fifteen years before, Owens was employed in the Spokane railroad yards as an engine or switching crew foreman. His crew was composed of himself, the engineer, the fireman, and two others. The crew's work consisted in shuttling freight cars about the yards in accordance with the requirements of the railroad's freight schedule.

The fatal switching maneuver was the shifting of two boxcars from their position on the "lead" track, west of a switch designated No. 7, to track 13. To accomplish this the engine was required to proceed westerly along the "lead" line until it hooked up the two freight cars, then to back the train thus formed along that line over switch 7 and, after the switch was set, to "kick" the cars so they would roll over the switch on to track 13, while the engine stopped and started back to get another car. The engineer's cab was on the north side of the track, the switch stand and handle were on the south side.

While the engine was slowly backing after being coupled to the freight cars, Owens and one of his men, Koefod, rode on the north side of the train, clinging to the facing stirrups and handrails between the two boxcars. As the cars crossed the switch, Owens dropped off on the north side, telling Koefod to "let these cars go 13." When the train had passed, Owens crossed to the south side in order to set the switch. The train stopped with its western end at a distance estimated variously at seven to thirty feet from, but in any event unusually close to, the switch point. Koefod dropped off on the north side of the track and took a position about 20 feet north of the track from which he could see the switch points but could not see either the switch handle or Owens, both being obstructed from his view by the cars. Similarly, the engineer, on the north side of the train, could not see Owens. The other two men also were out of vision. When Koefod saw the switch point move into line, without awaiting any sign from Owens he signalled the engineer to "kick" the cars. This the latter promptly did. No warning was given to Owens either by bell, by whistle, or by call on starting the "kick." It is important to note that, all told, between the stopping of the receding train and the "kick" about ten seconds elapsed.

In this interval, Owens, having set the switch, began to walk across the track to the north side. No evidence was available or introduced to show his reason for doing so.[1] Since he was looking northward, he did not see the "kicked" cars coming toward him until too late. He then tried to leap out of the way, but failed and was struck by the cars, which rolled over him. His legs were

[1] Indeed, the only evidence on the question of decedent's movements during this time is furnished by an engineer who saw the accident from the cab of a nearby engine. He testified:

"He was looking north—just for an instant he turned his head down to the yard and when he straightened his head up—why just before he straight-

severed from his body. Although he was removed to a hospital almost at once, he died within a few hours.

If this were all the evidence, the case would be clearly one in which the jury might find there was negligence on the part of Koefod or the engineer, or both, and that Owens' conduct amounted to no more than contributory negligence, if it was that.

But the company sought to avoid the effect of these facts by proving that Rule 30 was not applicable in ordinary switching operations, that it was not customary to ring the engine's bell during them, that it was customary for the man at the switch handle to remain there until movement of the "kicked" cars stopped, that it was the practice for the man in Koefod's position to signal for the kick without waiting either for a signal from the man at the switch, or to see whether the latter remained there, and that Owens had followed these practices in the past.

The purpose of this evidence apparently was twofold. The first object was to show that the company was not negligent. It sought particularly to avoid the effect of a finding that the engineer's failure to ring the bell was a violation of Rule 30 and therefore was negligence per se. But the evidence also was directed to prove that, apart from the ringing of the bell, neither Koefod nor the engineer acted negligently in assuming that Owens knew the matters sought to be proved and would remain at the switch until the cars had passed by; and therefore that they acted properly in going ahead without taking the precautions which would have been necessary if they had not been entitled to make this assumption.

The same evidence also was the basis of the company's contention that Owens assumed the risk of his injury. Although the Court of Appeals declined to determine whether it would support a legal conclusion there was no negligence, it apparently accepted the company's view that it established assumption of risk as a matter of law.

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ened his head up I got scared and I says 'them cars are going to corner him'—they were coming about six miles an hour—I had no way of telling how fast they were going—I had a head end view of the cars and before I could do a thing, or give him any warning, I was too far away—just as he turned around he seen the cars coming almost on top of him—he didn't have time to get out of the way—he throwed himself back and sideways, and as I recollect a draw bar hit him about in here—his right side—

Q. "What happened to him?

A. "It knocked him down right in the center of the track; as near as I could understand the first part of the trucks run over him."

The difficulty with this ruling is that it ignores conflicting evidence presented on behalf of petitioner. This consisted in testimony to the effect that the men in the switching crew customarily "looked out" for each other, particularly when a man was not in sight during operations, that one in Koefod's position would not signal for the "kick" until he saw that the man at the switch was out of harm's way, and that there was a custom to wait before ordering the "kick" until the man at the switch signalled to the man in Koefod's position.

In this state of the record there was a square clash of evidence bearing on whether Owens knew that the cars would be "kicked" without any prior indication to him—either by ringing the bell or by signal from others in the crew—and decided to cross the track anyway. And these questions were crucial, in the circumstances, to whether he voluntarily assumed the risk of the conduct which brought about his death.

That is true, unless it is to be held that Owens, when he accepted and continued in his employment, knew that risks of the general character which caused his death would be incurred and, by taking or continuing in the work, accepted their burden; in other words, not that he knew of and accepted the particular risk at the time it descended, but knew generally that risks of such a character might fall and elected in advance to sustain them. We think no such view is consistent with the statute's provisions.

Recently this Court reviewed "the maze of law which Congress swept into the discard,"[2] when in 1939 it amended the Employers' Liability Act to abolish the defense of assumption of risk.[3] In view of the amendment, no good purpose would be served in going over this morass again merely to dispose of this case. But we point to a few lodestars.

The common-law defenses, assumption of risk, contributory negligence, and the fellow-servant rule were originated and developed in common ground.[4] Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a confusion which only served

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[2] Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54.

[3] 53 Stat. 1404, 45 U. S. C. § 54.

[4] Cf. Priestley v. Fowler, 3 M. & W. 1 (1837); Farwell v. Boston & Worcester R. R. Corp., 4 Metc. (Mass.) 49; Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91 (1906); Butterfield v. Forrester, 11 East 60 (1809); Davies v. Mann, 10 M. & W. 546 (1842); Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233 (1908).

to create more;[5] so that in time the three became more, rather than less, indistinguishable. And assumption of risk took over also, in misguided appellation, large regions of the law of negligence. What in fact was absence of departure from due care by the defendant came to be labelled "assumption of risk."[6] Apart from this effect, so long as the area of application was overlapping[7] and each when established had the effect of defeating liability, it was not a matter of great moment to distinguish the defenses sharply or carefully, when the facts would sustain one.

But under the Employers' Liability Act prior to 1939 there was inescapable reason for making accurate differentiation of the three. For each produced different consequences. Assumption of risk remained a complete defense to liability. Contributory negligence merely reduced the damages.[8] The fellow-servant rule was abolished.[9]

These distinct consequences required distinct treatment of the three conceptions. This meant that so far as assumption of risk, which remained a complete defense, had swallowed up contributory negligence and the fellow-servant rule, the latter, having different effects, should be withdrawn from its enfolding embrace. In that way only could the clear legislative mandate be carried out and the distinct consequences attributed by it to each be attained. To permit assumption of risk still to engulf all the proper territory of contributory negligence and the fellow-servant rule would be only and plainly to nullify Congress' command.

Unfortunately the injunction has not been followed consistently. There are decisions which, in the guise of applying assumption of risk, do no more than shift to the injured employee the burden of his fellow servants' negligence, while others appear to identify the doctrine with mere contributory negligence. Old confusions die hard. And in this instance some refused to die at all or did

[5] Cf. Tiller v. Atlantic Coast Line R. R. Co., 318 U. S. 54, and authorities cited.

[6] *Ibid.*, concurring opinion of Mr. Justice Frankfurter; Hocking Valley Ry. Co. v. Whitaker, 299 Fed. 416 (C. C. A.); Harper, Torts (1933) 292, and authorities cited, note 11; Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 91.

[7] Cf. Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 243, *et seq.*

[8] 35 Stat. 66.

[9] 35 Stat. 65; Chesapeake & Ohio R. R. v. De Atley, 241 U. S. 310; Second Employers' Liability Cases, 223 U. S. 1; Reed v. Director General of Railroads, 258 U. S. 92.

so only intermittently. We do not now attempt the refined distinctions or the broader obliterations which might be required, if the 1939 amendment had not become law, in order to give effect to the original Congressional purpose. It is wholly inconsistent with that object and with the statute's wording to hold that the employee, merely by accepting or continuing in the employment, assumes the risk of his fellow servants' negligence or that conduct on his part in a particular situation which amounts to no more than contributory negligence can have that effect.

In this case, if there was negligence upon the employer's part, as to which we express no opinion, it lay either in the company's failure to enforce Rule 30, if that rule was applicable to switching operations, or in the negligence of a fellow servant of Owens and nothing more than that.[10] In the former case, assumption of risk would not apply, at any rate as a matter of law, in the absence of conclusive proof that the employee knew the rule was not applicable or had been abandoned and elected to take his chances in crossing the track.

If we turn then to the other alternative, the fellow-servant doctrine contemplated that an employee knew and assumed, when he accepted employment, the risks which negligence of his fellow employees might create. It was in fact a branch of assumption of risk. When therefore Congress abolished the fellow-servant rule as a defense under the statute, it necessarily abolished the defense of assumption of risk to this extent. In other words, it eliminated the general anticipation of fellow servants' negligence, upon which the fellow-servant rule was founded. If anything of assumption of risk remained in relation to the negligence of a fellow employee, it was such as required a showing that the injured one knew of and accepted the risk in the particular incident or situation which brought about his injury. There was therefore in this case, consistently with the statute, no general assumption by Owens, by virtue of his acceptance or retention of the work,

[10] This is true whether the fellow servant's negligence consisted in a violation of Rule 30, as the trial court permitted the jury to find, or in any of the other allegedly negligent acts or omissions, which the court refused to submit to the jury. For in any event the conduct claimed to be negligent was that of Koefod or the engineer, both of whom were fellow servants. We cannot assume that the court, when it cast its decision in terms of assumption of risk, intended to rule that there was no evidence of negligence (cf. note 6, *supra*), since its opinion expressly disclaims determining the proper construction of Rule 30, whether its violation would constitute negligence per se, and the other questions raised by the parties on the appeal.

of the risk which caused his death in so far as it consisted in negligence by Koefod or the engineer.

What remained of the defense, therefore, narrows the inquiry to whether Owens can be shown to have anticipated and decided to chance the particular risk here created by the negligence of his fellow employees. Cf. *Reed* v. *Director General of Railroads*, 258 U. S. 92. As has been shown, respondent has not sustained this burden. That is true, whether the inquiry is couched in terms of Owens' actual knowledge[11] and deliberate choice[12] or of the "obvious" and "apparent" character of the risk.[13] For, to prevail on this defense, respondent had the burden of persuading the jury that the risk of being run down was "so plainly observable" that Owens was in fact aware of it and decided to chance it. Less than that, under this statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense. The jury decided that respondent had not sustained the burden imposed. We cannot agree with the Court of Appeals that as a matter of law it has. The record shows neither such clear evidence of an informed and deliberate choice by Owens as would preclude a contrary verdict nor so "obvious" or "apparent" a danger as would do so.[14]

If there was negligence by the respondent, the statute requires something more than contributory negligence to defeat recovery, though that may minimize the damages. The jury found this issue in favor of the plaintiff. And the Court of Appeals did not purport to deal with it and did not do so unless, in the guise of finding assumption of risk, it identified the two. Since it did not deal with the question, we do not decide it. But we think it is clear that on the facts Owens' conduct amounted to no more than contributory negligence, if it was that.

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[11] Cf. 3 Labatt, Master and Servant (1913), §§ 1190-1192; York v. Chicago, M. & St. P. R. R., 184 Wis. 110; Dollar Savings Fund & Trust Co. v. Pennsylvania Co., 272 Pa. 364; Rummell v. Dilworth, 111 Pa. 343.

[12] Cf. Thomas v. Quartermaine, L. R. 18 Q. B. D. 685; Yarmouth v. France, L. R. 19 Q. B. D. 647; Smith v. Baker & Sons [1891] A. C. 325.

[13] Cf. Seaboard Airline R. R. v. Horton, 233 U. S. 492; Gila Valley, G. & N. R. R. v. Hall, 232 U. S. 94; Chesapeake & Ohio R. R. v. De Atley, 241 U. S. 310; Chicago & N. W. R. R. v. Bower, 241 U. S. 470; Chesapeake & Ohio R. R. v. Proffitt, 241 U. S. 462; and compare Schlemmer v. Buffalo, R. & P. Ry., 205 U. S. 1, 220 U. S. 590; Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233; Alexander, Re-Thinking Negligence, 11 Miss. L. J. 290.

[14] Cf. Gila Valley, G. & N. R. R. v. Hall, 232 U. S. 94; Chesapeake & Ohio R. R. v. De Atley, 241 U. S. 310; Chesapeake & Ohio R. R. v. Proffitt, 241 U. S. 462; Chicago, R. I. & P. R. R. v. Ward, 252 U. S. 18; Chicago & N. W. R. R. v. Bower, 241 U. S. 470.

Whether the trial court properly charged the jury that a violation of Company Rule 30 was ipso facto negligence[15] and took from it the other claimed grounds of negligence[16] are questions the Court of Appeals did not reach and we therefore have no occasion to decide. Similarly, in view of our conclusion on assumption of risk, we have no occasion to determine whether the 1939 amendment to the Federal Employers' Liability Act, abolishing that defense, operates where the accident occurred before its enactment but suit is brought after.

The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings in conformity with this opinion.

Mr. Justice REED dissents because he reads the evidence as showing without contradiction that Rule 30 was not applicable to these switching operations and that it was the practice of switching crews under the circumstances of this movement to "kick" the cars without waiting for a signal from the man in decedent's position at the switch. It follows that the defense of assumption of risk is good.

The CHIEF JUSTICE and Mr. Justice ROBERTS join in this dissent.

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[15] Cf. Gildner v. Baltimore & Ohio R. R., 90 F. 2d 635 (C. C. A.); Pacheco v. New York, N. H. & H. R. R., 15 F. 2d 467 (C. C. A.).

[16] "(a) that defendant and defendant's employees carelessly and negligently failed and neglected to keep a proper lookout for plaintiff's decedent and to ascertain his whereabouts before moving said cars; which said lookout was the custom and practice known to and adopted by defendant; (b) that defendant and defendant's employes carelessly and negligently moved said cars upon said track without any notice or warning whatsoever to plaintiff's decedent; (c) that defendant and defendant's yardmen carelessly and negligently failed and neglected to receive a hand or other signal from plaintiff's decedent before signaling defendant's engineer to kick or move the aforesaid cars; the receipt of which said signal was the custom and practice known to and adopted by defendant; . . . (e) that defendant carelessly and negligently failed and neglected to provide plaintiff with a safe place to work."